

Pursuant to 17 U.S.C. § 801(c) and 37 C.F.R. § 351.5(b), Google LLC (“Google”) respectfully submits this Opposition in response to National Music Publishers’ Association and Nashville Songwriters Association International’s (collectively, “Copyright Owners” or “COs”) *Motion to Compel Production of Documents and Information From Services Concerning Their Rate Proposals*, dated January 26, 2021 (the “Motion” or “Mot.”).

I. INTRODUCTION

Google and COs have worked diligently to keep discovery disputes at a minimum and, as a result, this Motion largely does not concern Google. Only eight of the thirty-two RFPs and four of the six interrogatories addressed in the Motion are directed at Google. And, Google has already provided the requested discovery for many of them.

The remaining dispute is ultimately a disagreement over the proper scope of discovery. The Motion advances an incredibly overbroad view of “relevance” that makes anything even remotely tangential to revenues or costs subject to extensive, audit-like discovery. But that is not the standard for discovery in this proceeding and this is not the forum for an audit. As the Judges have made clear, information sought in discovery must be *directly related* to the producing party’s written direct statement or, in the case of interrogatories, relevant to either party’s direct case. *See* 37 C.F.R. §§ 351.5(b)(1) (“A participant in a royalty rate proceeding may request of an opposing participant nonprivileged documents that are *directly related* to the written direct statement . . . of that participant. ***Broad, nonspecific discovery requests are not acceptable.***”) (emphases added), 351.5(b)(2) (for interrogatories, information may only be obtained as to non-privileged matters that are “*relevant to the claim or defense* of any party.”) (emphasis added); *Order Denying Services’ Motion to Compel Copyright Owners to Produce Documents Relating to Subpart A Settlement, Phonorecords III*, Docket No. 16-CRB-0003-PR (2018-2022), at 2 (Feb.

14, 2017) (“The Judges find that the settlement communications sought by the Services are not ‘directly related’ to the Copyright Owners’ WDS as required by the Judges’ procedural rules, and are therefore not discoverable.”) (citing 37 C.F.R. § 351.5(b)(1)).

COs are not pursuing information that is “directly related” or relevant to Google’s (or COs’) direct case here. Instead, they seek extensive historical revenue and cost information to “measure the magnitude and impact” that Google’s proposed rates and terms would allegedly have on already paid mechanical royalties. But Google’s rate proposal¹ does not turn on the “impact” or “magnitude” of any particular rate prong or term. In fact, Google’s written direct statement does not discuss those issues at all. Rather, Google has proposed that the Section 115 regulations be updated to reflect the rates and terms agreed to in its freely negotiated license agreements with music publishers. *See* Google’s Introductory Memorandum ISO WDS (“Google’s Introductory Memorandum”) at 1-4; *see generally* Google’s Proposed Rates and Terms. In other words, Google’s rate proposal is based on the appropriateness of the various components of its rate proposal under the governing standard. Google’s direct case is not based on the magnitude or impact of components of the rate proposal, and the same is true of COs. The discovery COs seek in this regard is therefore not “directly related” or relevant to either Google’s or COs’ direct cases, even if it bears some “tangential[] or indirect[] relation” to revenue or cost. *See Order Granting in Part and Denying in Part Joint Motion by Pandora, iHeart, NAB, NRBNMLC and Sirius to Compel SoundExchange to Produce Negotiating Documents, Webcaster IV*, Dkt. No. 14-CRB-0001-WR (2016-20), at 3 (Jan. 15, 2015) (“*Discovery Order*

¹ COs’ contention that the “revenue-related allocations and deductions” proposed by the Services are “not permitted” is not the proper subject of a discovery motion, and is also wrong. *Opp.* at 7. As Google’s written direct statement explains, allocation of revenue is permitted by the regulations and consistent with Google’s many license agreements with music publishers negotiated in the free market. *See generally* Google’s WDS.

11”) (denying in part motion to compel because the subject documents—“although perhaps tangentially or indirectly related to the SoundExchange WDS—are not ‘directly related to’ that WDS.”).

Further, COs’ use of discovery in this proceeding to audit Google’s prior royalty calculations and payments is inappropriate. This proceeding is for determining the rates and terms that will govern the licensing of musical works on a forward-looking basis, not for auditing past royalty payments. In fact, individual copyright owners have no audit right of a statutory licensee and it is only the MLC that has the right to initiate an audit of a digital music provider and then, only through a qualified auditor. 17 U.S.C. §115(d)(4)(D)(i). And as for COs’ intent to “test and challenge” the impact of certain adjustments to revenue or cost, there is nothing stopping their expert witnesses from analyzing different scenarios based on the actual payable royalty pool data that Google has provided. COs do not need the historical audit-like data they seek to test potential impacts, nor are they entitled to it. *See Order Granting in Part and Denying in Part Services’ Omnibus Motion to Compel SoundExchange to Produce Documents, Webcaster IV*, Dkt. No. 14-CRB-0001-WR (2016-20), at 4 (Jan. 15, 2015) (denying in part motion to compel because “[t]he mere mention of an agreement in written testimony . . . does not necessarily render discoverable every document connected in some way to that agreement,” and regardless, moving parties “can test [opposing party’s expert] Dr. Rubinfeld’s assertions readily without reference to any of the requested documents.”).

In sum, there is no basis to seek the burdensome discovery at issue. The Motion should be denied.²

² COs’ Motion should also be denied as untimely. The Services agreed to extend the deadline to serve motions to compel from December 23, 2021 to January 10, 2022, while COs took the position that December 23 was not a “motion to compel deadline” and, therefore, that the January 10, 2022 date was not an extension of such deadline. *See Ex. 1 at 1*. COs’ position lacks merit. By their logic, motions to compel could be filed at any time—even during

II. COPYRIGHT OWNERS’ MOTION SEEKS DISCOVERY AND INFORMATION THAT EITHER IS ALREADY IN THEIR POSSESSION OR IS IRRELEVANT AND UNRELATED TO GOOGLE’S AND COPYRIGHT OWNERS’ DIRECT CASES

A. INTERROGATORY NO. 8

Interrogatory No. 8 seeks an identification of all estimates used to determine any input to the calculation of the payable royalty pool under 37 C.F.R. Part 385 for any of the Services’ Offerings, and any actual figures that those estimates were later adjusted to. Mot., Ex. 3 at 247. COs claim to be “entitled to know which royalty calculation inputs the Services estimated” and “the impact such adjustments . . . had.” Mot. at 6.

Not so. Google’s and COs’ rate proposals and written direct cases did not touch on any issues concerning the circumstances under which estimates might be appropriately applied, or any rules governing the application of estimates. As COs admit, the driving force behind their request for estimate-related information is not any supposed relevance to either Google’s or COs’ rate proposals, but rather would be the equivalent of an audit of Google’s past royalty payments. *Id.* (“COs . . . are entitled to know . . . the impact such adjustments [estimates], if any, had on the payable royalty pool, so that there is a complete picture of the royalties paid. . . .”); *see* 37 C.F.R. § 351.5(b)(2).

That is inappropriate in this proceeding, which was established for the forward-looking determination of the governing rates and terms for the licensing of musical works. 17 U.S.C. § 115(c)(1)(E). This proceeding is not an appropriate avenue for COs to obtain information for the

or after the Hearing in this proceeding—so long as the disputes were noticed by January 10. Further, there is no legitimate reason that COs could not have timely filed the Motion by January 10 because the discovery disputes at issue have been pending since at least December 23, 2021.

purpose of vetting Google's past payments, to the extent they utilized estimates.³ That type of audit-like examination might be available for royalty payments under voluntary agreements where those agreements provide for audit rights, or pursuant to the MLC's authority to undertake audits relating to the statutory license, but it is not within the ambit of discovery here. COs' Motion should be denied as to Interrogatory No. 8.

B. RFP NO. 109

RFP No. 109 seeks documents showing the revenues Google has reported to the MLC or any sound recording or musical work licensor for any product or service that includes any of its Eligible Digital Music Services. Mot., Ex. 3 at 134. The Motion does not specify precisely what the dispute is with respect to this RFP, but based on COs' meet and confer positions, it appears to be over the portion targeting revenue reporting to sound recording licensors.⁴

Yet the Motion offers no basis on which revenues reported to sound recording licensors could be viewed as "directly related" to Google's direct case. Nothing in Google's rate proposal turns on reported revenue to sound recording licensors. *See generally* Google WDS; Google's Introductory Memorandum at 4 (summarizing Google's *Phonorecords IV* royalty rate proposal).

³ Even if the information sought by Interrogatory No. 8 were relevant (which it is not), Google has already produced data that would demonstrate any "recalculated royalties using the actual input amounts once finalized" following any utilization of estimates. Mot. at 6. Specifically, Google has produced [REDACTED]

[REDACTED] (GOOG-PHONOIV-00004492). And, COs also have direct access to each set of this data submitted by Google to the MLC. *See Services' Motion for Protective Order to Prevent Circumvention of Discovery Rules with Respect to Data in the Possession of the Mechanical Licensing Collective, Phonorecords IV*, Dkt. No. 21-CRB-0001-PR (2023-2027) (eCRB Dkt. No. 25609) (Aug. 16, 2021) ("MLC Motion") (COs obtained the Services' royalty pool data directly from the MLC); COEX-7.35 (Google MLC data obtained by COs).

⁴ Documents showing Google's revenue reporting to the MLC and musical works licensors, on the other hand, are already in COs' possession and control. As COs acknowledge, they have direct access to data reported by Google to the MLC; and Google has already produced [REDACTED]. *See* MLC Motion; COEX-7.35; (GOOG-PHONOIV-00004492).

COs’ claim that they need discovery into whether revenues reported to different licensors is “identical[]” is entirely conclusory, with no explanation of the relevance of such information to Google’s direct case. Mot. at 9. The definitions of reportable revenue under sound recording license agreements may differ among services and among licenses and will cover different copyrighted works and the rights licensed with respect to such works; it would therefore be entirely unremarkable (and irrelevant to any issue in this proceeding) if revenue reported to sound recording licensors were to vary. Far from providing any justification for why the requested information is related to Google’s direct case, COs admit the actual reason they are seeking this information: it is allegedly “relevant to COs’ ability to test and challenge how each Service has calculated and reported, and intends under its Rate Proposal to calculate and report, its revenues to musical work licensors.” Mot. at 9. But that, again, is nothing more than an attempt to use the discovery process in this proceeding to audit Google’s past royalty reporting, which is not proper. Congress has enacted a limited mechanism for auditing services operating under the Section 115 statutory license and this proceeding is not an appropriate forum for an audit to be conducted.

COs’ Motion should be denied with respect to RFP No. 109.

C. INTERROGATORY NO. 6

Interrogatory No. 6 seeks an identification and explanation of every instance in which Google reported different revenues in connection with any of its Eligible Digital Music Services to musical works licensors, on one hand, and to the MLC, on the other hand. Mot., Ex. 3 at 246.

COs claim that this interrogatory seeks information about what Google “intends under its Rate Proposal to calculate and report.” Mot. at 9. But the plain language of Interrogatory No. 6 seeks only information about differences in revenue that has already been reported. Moreover,

similar to RFP No. 109, COs admit that what this interrogatory actually seeks is information directed to the equivalent of an audit of Google's past royalty payments. Mot. at 9 ("information is relevant to COs' ability to test and challenge how each Service has calculated and reported"). This is insufficient to render the information sought relevant to Google's written direct statement, or that of COs, and it is not a proper purpose of discovery in this proceeding.

In any event, COs have access to documents containing the information sought by this interrogatory through their relationships with the music publishers they represent and with the MLC. *See generally* MLC Motion; *see also, e.g.*, COEX-7.35. The discovery process in this proceeding should be directed to information related to the parties' direct cases under governing legal principles, and not for other uses. COs' Motion should be denied as to Interrogatory No. 6.

D. INTERROGATORY NO. 5

Interrogatory No. 5 is an exceptionally broad and burdensome request seeking an identification and explanation of every single "data point[]," "calculation process," and all "queries and code" used to calculate "Revenues" for each Google "Offering" for a five-year period. Mot., Ex. 3 at 246. COs contend that an explanation of "how" Google calculates Service Provider Revenue "sheds light on the real-world" rather than "abstract" application of Google's rate proposal. Mot. at 9.

First, Google has already sufficiently answered this interrogatory by explaining that it " [REDACTED] [REDACTED] " and specifically describing "how" ad-supported and subscription-based Revenues are calculated. *See* Mot., Ex. 3 at 280.

Second, none of the other information COs seek is relevant to Google's or COs' proposed rates and terms. COs are not merely requesting an explanation of "how" Revenues are calculated.

They are asking for granular accounting details over a five-year historical period (in the form of an interrogatory response, no less). The fact that such data may “shed light” on Google’s prior Revenues calculations does not make it relevant to Google’s or COs’ proposals in *this* proceeding, neither of which depend on “data” or “queries and code” from historical calculations. COs should not be permitted to audit Google under the guise of discovery, particularly given the burden their proposed audit would impose.

As such, COs’ Motion should be denied as to Interrogatory No. 5 because it seeks audit information that is not relevant to either Google’s or COs’ direct case.

E. RFP NO. 10 AND INTERROGATORY NO. 13

RFP No. 10 and Interrogatory No. 13 seek five years of historical financial data and information quantifying the exact “dollar *amounts*” of Google’s proposed deductions from Service Provider Revenue. *See* Mot. at 11-13 (emphasis added). COs claim that this information is necessary to “assess” the “magnitude and impact” of the proposed deductions, and that each Services’ rate proposal puts the impact of their deductions “squarely at issue.” *Id.* at 12. That is incorrect.

The “amount” and “impact” of Google’s proposed reductions are not directly related or relevant to Google’s written direct case. Google has not offered any testimony about the actual dollar amounts of its proposed deductions, or suggested that the propriety of the deductions are based on their “amount” or “impact.” Instead, Google’s proposed deductions are based on provisions in Google’s marketplace agreements that permit the exclusion of certain fees, taxes, and revenues from the negotiated definition of “Net Subscription Revenue.” *See* Google’s Introductory Memorandum at 17. So even if the information COs seek here were somehow

“tangentially” or “indirectly” related, it is not directly related or relevant to Google’s proposal or the evidence it offers in support. *See Discovery Order 11* at 3.

To the extent COs want to “assess” Google’s proposals or use data to examine the “magnitude and impact” of its proposed deductions, COs already have the information they need. For the former, COs can refer to the very agreements that those proposals are based on and that Google produced months ago. For the latter, COs can run an impact analysis using hypothetical information to conduct that assessment. There is simply no basis or need for the requested discovery.

COs’ Motion should be denied as to RFP No. 10 and Interrogatory No. 13 because it seeks information that is not directly related or relevant to Google’s written direct case or necessary to evaluate Google’s proposals.

F. RFP NOS. 114 AND 116

RFP Nos. 114 and 116 seek documents sufficient to show all of the consideration that Google includes in its “determinations of Total Content Costs for calculating Mechanical Royalties,” and all documents underlying “each distinct Total Content Costs total” that Google reported to the MLC or any other musical works licensor. Mot. at 13-14. COs do not even attempt in their Motion to argue that these requests are directly related to Google’s written direct statement. Instead, they quote an inapposite *Phonorecords III* Order without explaining how or why it justifies their requested discovery. It does not.

In *Phonorecords III*, the Judges did not grant COs’ request for documents concerning Spotify’s total content costs and payments to record companies merely because Spotify’s “rate proposal included a TCC component for certain offerings,” as COs represent. Mot. at 13. Rather, Spotify relied on expert testimony arguing that its high total content costs were negatively

impacting its profitability and success. *See Order Granting in Part and Denying in Part Copyright Owners' Motion to Compel Production of Documents Concerning Record Label Ownership Equity In Spotify*, Docket No. 16-CRB-0003-PR (2018-22), at 2 (Feb. 14, 2017). Therefore—unlike here—Spotify put the **actual amount** of its payments to record companies at issue. *Id.* at 2-3. As a result, the Judges agreed that the value of equity interest (if any) that Spotify granted to record companies was directly related to that issue, including because “the compensation paid to record companies (including any equity interest) constitutes a large portion of the total content costs that [Spotify’s expert] decries in his testimony.” *Id.* at 2.

There is no similar direct relation between Google’s written direct statement and RFP Nos. 114 and 116. Though Google’s rate proposal includes a TCC prong, Google has not submitted **any** testimony related to the actual amounts it pays to record labels, or suggested any changes to the TCC formulation based on those amounts. *See Google’s Proposed Rates and Terms* at 10, 12-13. To the contrary, Google’s proposed rates and terms are based on its negotiated agreements with music publishers.

COs’ Motion as to RFP Nos. 114 and 116 should be denied because those requests are not directly related to Google’s testimony.

G. RFP NOS. 137, 138, AND 88

RFP Nos. 137 and 138 seek all documents concerning Google’s Promotional Offerings that Google is “required to retain” pursuant to 37 C.F.R. Part 385. RFP No. 88 seeks “[a]ll Analysis concerning the Impact of any Discounted Subscription Offering or Promotional Offering on royalties payable for the use of musical works on [Google’s] Services.” COs argue they need these documents to examine the “impact” Google’s proposals concerning promotional offerings will have on mechanical royalties. *See Mot.* at 14-15. But, once again, Google has not

offered any testimony about the “impact” its proposed terms will have on mechanical royalties. Nor is its proposal based on any such “impact.” Instead, Google’s rate proposal merely codifies the promotional discounts included in its voluntarily negotiated direct licenses with music publishers, which have already been produced. *See* Google’s Introductory Memorandum at 13, 16-17. The mere discussion of promotional offerings, even if “tangentially or indirectly” related to Google’s written direct statement, is not “directly” related to that written direct statement. *See Discovery Order 11* at 3. Moreover, COs are not entitled to documents in discovery simply because they were retained pursuant to regulations. COs must carry their burden of demonstrating that the documents are directly relevant to Google’s WDS, which they have not. *See* 37 C.F.R. § 351.5(b)(1). And, again, to the extent COs seek this information as a quasi-audit of past treatment of promotional offerings, that is not a proper use of discovery in this proceeding.

As to RFP No. 88, Google has already conducted a reasonable search for and produced documents responsive to this request. Specifically, Google has produced three documents: [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] (GOOG-PHONOIV-00004524-038, 4494, 4509).

COs’ Motion should therefore be denied as to RFP Nos. 88, 137, and 138 because they seek information that is not directly related to Google’s direct case (and Google has already produced documents responsive to RFP No. 88).

H. RFP NO. 117

RFP No. 117 seeks “[a]ll documents underlying each distinct Performance Royalty total that [Google has] reported to any musical work licensor in any period for any product or service

that includes any of Google’s Eligible Music Digital Services[.]” COs appear to want backup data underlying Google’s reported performance royalty deductions. But that data is not directly related to Google’s direct case and COs’ do not even attempt to argue that it is. *See* Mot. at 15.

Google has already produced documents showing the “applicable public performance royalties” subtracted “from an all-in royalty calculation.” Specifically, Google has produced the

[REDACTED]

[REDACTED]

[REDACTED]. (GOOG-PHONOIV-00002284, 4492).

To the extent COs seek additional data, they have failed to meet their burden of establishing that it is directly related to Google’s proposed rates and terms. COs’ Motion as to RFP No. 117 should be denied.

III. CONCLUSION

For the foregoing reasons, Google respectfully requests that the Judges DENY COs’ Motion.

Dated: February 3, 2022

Respectfully submitted,

/s/ Lisa D. Zang

Gary R. Greenstein (DC Bar No. 455549)
WILSON SONSINI GOODRICH & ROSATI
1700 K Street, N.W., 5th Floor
Washington, DC 20006
Tel. (202) 973-8849
ggreenstein@wsgr.com

Victor Jih (Cal. Bar No. 186515)
Lisa D. Zang (Cal. Bar No. 294493)
Ryan Benyamin (Cal. Bar No. 322594)
WILSON SONSINI GOODRICH & ROSATI
633 West Fifth Street, Suite 1550
Los Angeles, CA 90071-2027
Tel.: (323) 210-2900
vjih@wsgr.com
lzang@wsgr.com
rbenyamin@wsgr.com

Maura L. Rees (Cal. Bar No. 191698)
WILSON SONSINI GOODRICH & ROSATI
650 Page Mill Road
Palo Alto, CA 94304-1050
Tel.: (650) 493-9300
mrees@wsgr.com

Jeremy Auster (NY Bar No. 5539101)
WILSON SONSINI GOODRICH & ROSATI
1301 Avenue of the Americas 40th Floor
New York, NY 10019-6022
Tel.: (212) 999-5800
jauster@wsgr.com

Attorneys for Google LLC

Before the
UNITED STATES COPYRIGHT ROYALTY BOARD
Washington, D.C.

In the Matter of:

DETERMINATION OF RATES
AND TERMS FOR MAKING AND
DISTRIBUTING PHONORECORDS
(*Phonorecords IV*)

Docket No. 21-CRB-0001-PR
(2023-2027)

DECLARATION OF LISA D. ZANG
(On Behalf of Google LLC)

1. I am an associate with the law firm Wilson Sonsini Goodrich & Rosati, P.C., and counsel for Google LLC (“Google”) in the above-captioned proceeding. I submit this declaration in support of Google’s Opposition to Copyright Owners’ Motion to Compel Production of Documents and Information from Services Concerning Their Rate Proposals (the “Opposition”). I am fully familiar with the facts and circumstances set forth herein.

2. Attached hereto as Exhibit 1 is a true and correct PDF printout of an email from Joshua D. Branson, counsel for Amazon.com Services LLC, to Marion R. Harris, counsel for Copyright Owners, dated December 22, 2021.

3. Pursuant to 28 U.S.C. § 1746, I hereby declare under penalty of perjury that the foregoing is true and correct to the best of my knowledge, information, and belief.

Dated: February 3, 2022

Respectfully submitted,

/s/ Lisa D. Zang

Lisa D. Zang (Cal. Bar No. 294493)
WILSON SONSINI GOODRICH & ROSATI
633 West Fifth Street, Suite 1550
Los Angeles, CA 90071-2027
Tel.: (323) 210-2900
lzang@wsgr.com

Attorney for Google LLC

EXHIBIT 1

Brown, Laura

From: Branson, Joshua D. <jbranson@kellogghansen.com>
Sent: Wednesday, December 22, 2021 12:36 PM
To: Harris, Marion R.; Avila, Alejandra; Pryor Cashman PHONO4 CIG
Cc: Kirkland PHONO4 CIG; WSGR - Phono4CIG; c-mphonorecordsivexternal-lwteam@lw.com; WEIL PHONO4 CIG; KELLOGG PHONO4CIG
Subject: Re: [EXTERNAL] Re: Phono IV - Letter re: COs R&Os to First Set of RFPs from Amazon, Pandora, and Spotify

[External]

Marion: The Services are OK with this arrangement and so can confirm that we will stand down on any motions until January 10. We reserve all rights as to the timeliness of any motions to compel filed after January 10. I should stress that the Services anticipate filing our motions (if any) on January 10, and so expect the Copyright Owners to provide final positions on open issues sufficiently in advance to enable motions to be filed on that date.

We are still reviewing your letter from yesterday and are aiming to get you a response ASAP to continue advancing the discussion.

Happy holidays.

Josh

From: "Harris, Marion R." <MHarris@PRYORCASHMAN.com>
Date: Wednesday, December 22, 2021 at 2:18 PM
To: "Branson, Joshua D." <jbranson@kellogghansen.com>, "Avila, Alejandra" <aavila@kellogghansen.com>, Pryor Cashman PHONO4 CIG <crb_phonorecords_counsel@pryorcashman.com>
Cc: Kirkland PHONO4 CIG <aplphonorecordsIV@kirkland.com>, Wilson Sonsini PHONO4 CIG <phono4cig@wsgr.com>, "c-mphonorecordsivexternal-lwteam@lw.com" <c-mphonorecordsivexternal-lwteam@lw.com>, WEIL PHONO4 CIG <pandoraphonoIV@weil.com>, KELLOGG PHONO4CIG <KELLOGGPHONO4CIG@lists.kellogghansen.com>
Subject: Re: [EXTERNAL] Re: Phono IV - Letter re: COs R&Os to First Set of RFPs from Amazon, Pandora, and Spotify

Josh,

In recognition of the holiday season and the extended schedule in Phonorecords IV, Copyright Owners will agree to not file any motions to compel until at least January 10, 2022, provided all Services agree to the same. Otherwise, consistent with your proposal, all participants reserve their rights with respect to all other arguments, including timeliness. To be clear, Copyright Owners do not believe that December 23 was a "motion to compel deadline" in any sense, even before the schedule was pushed back by two months thus far, and, accordingly, do not accept that the January 10, 2022 date is an extension of such "deadline."

Regards,

Marion R. Harris

Counsel

Pryor Cashman LLP

7 Times Square, New York, NY 10036-6569

mharris@pryorcashman.com

Direct Tel: 212-326-0128

Main Fax: 212-326-0806

Mobile: 646-573-8465

www.pryorcashman.com

A member of Interlaw, an International Association of Independent Law Firms

From: Branson, Joshua D. <jbranson@kellogghansen.com>

Sent: Tuesday, December 21, 2021 7:58 PM

To: Harris, Marion R. <MHarris@PRYORCASHMAN.com>; Avila, Alejandra <aavila@kellogghansen.com>; CRB Phonorecords Counsel <CRB_Phonorecords_Counsel@PRYORCASHMAN.com>

Cc: Kirkland PHONO4 CIG <aplphonorecordsIV@kirkland.com>; Wilson Sonsini PHONO4 CIG <phono4cig@wsgr.com>; c-mphonorecordsivexternal-lwteam@lw.com <c-mphonorecordsivexternal-lwteam@lw.com>; WEIL PHONO4 CIG <pandoraphonoIV@weil.com>; KELLOGG PHONO4CIG <KELLOGGPHONO4CIG@lists.kellogghansen.com>

Subject: Re: [EXTERNAL] Re: Phono IV - Letter re: COs R&Os to First Set of RFPs from Amazon, Pandora, and Spotify

Marion: The overwrought rhetoric ("cynical," "discourteous," etc.) is unnecessary and counterproductive. As I said before, we're sensitive to everyone's holiday schedules and are trying to come up with a fair solution that works for all sides. Thus, given the holidays, and the evolving nature of the Copyright Owners' position on our requests – along with the continuing nature of the negotiations suggested by your letter – how about this:

- We agree to extend the motion-to-compel deadline to January 10, and all parties commit to resolve their open disputes or reach impasse on those disputes as reasonably practical in advance of that date to enable motions to be filed then. In exchange, we agree to a "stand down" period over the holidays in which motions to compel won't be filed, thus mooted the need to agree to any briefing extensions to cover this period.
- Both sides reserve their rights about whether additional motions filed after January 10 are timely or not. The Services remain of the view that we need some deadline for motion practice over live disputes (with the exception for the Web IV situation where a dispute does not become apparent until later), but we understand that the Copyright Owners disagree with that view. For present purposes, we don't need to resolve that dispute but can instead proceed with a mutual reservation of rights.

Let us know if that works. Again, we are trying to be reasonable here, but we're not inclined to agree to a one-sided extension. We already made one proposal to solve this problem, which you rejected. Let us know if this modified proposal works. If not, we reserve our right to file on Thursday and adhere to the existing response schedule.

I also don't believe I have formal sign-off from all the Service-side clients on this exact proposal, but we can quickly get final positions for you if this (or something like it) works on your end.

Josh

From: "Harris, Marion R." <MHarris@PRYORCASHMAN.com>

Date: Tuesday, December 21, 2021 at 5:24 PM

To: "Branson, Joshua D." <jbranson@kellogghansen.com>, "Avila, Alejandra" <aavila@kellogghansen.com>, Pryor Cashman PHONO4 CIG <crb_phonorecords_counsel@pryorcashman.com>

Cc: Kirkland PHONO4 CIG <aplphonorecordsIV@kirkland.com>, Wilson Sonsini PHONO4 CIG

<phono4cig@wsgr.com>, "c-mphonorecordsivexternal-lwteam@lw.com" <c-mphonorecordsivexternal-lwteam@lw.com>, WEIL PHONO4 CIG <pandoraphonoIV@weil.com>, KELLOGG PHONO4CIG <KELLOGGPHONO4CIG@lists.kellogghansen.com>

Subject: RE: [EXTERNAL] Re: Phono IV - Letter re: COs R&Os to First Set of RFPs from Amazon, Pandora, and Spotify

Josh,

Attached please find Copyright Owners' response to the Services' December 16, 2021 letter.

Regarding motions to compel, Copyright Owners do intend to file motions to compel and may be in a position to do so between December 23 and January 3; however, whether such motions will be ripe remains a function of the Services' ongoing document productions and final positions on outstanding discovery issues. We take exception to your cynical view of a request to not weaponize the holiday season in connection with this proceeding, where the Judges have extended the schedule by two months precisely to relieve the urgency of the deadlines in this proceeding. In any event, should the Services choose to proceed in such a discourteous and rushed fashion, Copyright Owners reserve the right to seek relief from the Judges to reintroduce courtesy to this process.

Regards,

MARION R. HARRIS

Counsel

PRYOR CASHMAN LLP

7 Times Square, New York, NY 10036-6569

mharris@pryorcashman.com

Direct Tel: 212-326-0128

Main Fax: 212-326-0806

Mobile: 646-573-8465

www.pryorcashman.com

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From: Branson, Joshua D. <jbranson@kellogghansen.com>

Sent: Tuesday, December 21, 2021 11:22 AM

To: Harris, Marion R. <MHarris@PRYORCASHMAN.com>; Avila, Alejandra <aavila@kellogghansen.com>; CRB Phonorecords Counsel <CRB_Phonorecords_Counsel@PRYORCASHMAN.com>

Cc: Kirkland PHONO4 CIG <aplphonorecordsIV@kirkland.com>; Wilson Sonsini PHONO4 CIG <phono4cig@wsgr.com>; c-mphonorecordsivexternal-lwteam@lw.com; WEIL PHONO4 CIG <pandoraphonoIV@weil.com>; KELLOGG PHONO4CIG <KELLOGGPHONO4CIG@lists.kellogghansen.com>

Subject: Re: [EXTERNAL] Re: Phono IV - Letter re: COs R&Os to First Set of RFPs from Amazon, Pandora, and Spotify

Marion: The close of discovery is in 2 days. All sides appear to agree that, at the very least, there needs to be clear notice of disputes by then. While I appreciate that you called me to discuss on Friday, we need the Copyright Owners' position in writing to make final judgments about what disputes remain. It's not reasonable to wait to memorialize that position until the eve of the discovery deadline. I also disagree that our recent letter deviated from our meet-and-confer on Tuesday, but regardless, we need the Copyright Owners' positions today.

As for your other request to extend the motion-to-compel opposition deadlines, our concern is that this has become a one-sided proposal. Given the Copyright Owners' apparent view that there is no deadline by which they need to file their own motions to compel, it appears that all this extension would do is give the Copyright Owners extra time to respond to any motions we file this week, with no commensurate benefit for the Services – in that presumably it would leave the opposition deadlines the same for the motions the Copyright Owners decide to file next year. Can you tell us

whether the Copyright Owners intend to file any motions to compel this week? I think the Services generally would be amenable to some reciprocal arrangement to extend deadlines through the holidays, but we're reluctant to agree to an extension benefiting only one side.

Josh

From: "Harris, Marion R." <MHarris@PRYORCASHMAN.com>

Date: Monday, December 20, 2021 at 7:55 PM

To: "Avila, Alejandra" <aavila@kellogghansen.com>, Pryor Cashman PHONO4 CIG <crb_phonorecords_counsel@pryorcashman.com>

Cc: Kirkland PHONO4 CIG <aplphonorecordsIV@kirkland.com>, Wilson Sonsini PHONO4 CIG <phono4cig@wsgr.com>, "c-mphonorecordsivexternal-lwteam@lw.com" <c-mphonorecordsivexternal-lwteam@lw.com>, WEIL PHONO4 CIG <pandoraphonoIV@weil.com>, KELLOGG PHONO4CIG <KELLOGGPHONO4CIG@lists.kellogghansen.com>

Subject: [EXTERNAL] Re: Phono IV - Letter re: COs R&Os to First Set of RFPs from Amazon, Pandora, and Spotify

Alejandra,

I spoke with Josh on Friday afternoon, where I told him we would be providing a response early this week. It may be tomorrow if not tonight. Josh and I discussed the "big picture" issues and Copyright Owners' positions to resolve disputes around them, so you have our positions on those, which will also be memorialized in our response letter. The letter we received from the Services Thursday night differed in meaningful respects from some of our discussions on Tuesday, which required further client follow up.

Regards,

Marion R. Harris

Counsel

Pryor Cashman LLP

7 Times Square, New York, NY 10036-6569

mharris@pryorcashman.com

Direct Tel: 212-326-0128

Main Fax: 212-326-0806

Mobile: 646-573-8465

www.pryorcashman.com

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From: Avila, Alejandra <aavila@kellogghansen.com>

Sent: Monday, December 20, 2021 7:44 PM

To: Harris, Marion R. <MHarris@PRYORCASHMAN.com>; CRB Phonorecords Counsel <CRB_Phonorecords_Counsel@PRYORCASHMAN.com>

Cc: Kirkland PHONO4 CIG <aplphonorecordsIV@kirkland.com>; Wilson Sonsini PHONO4 CIG <phono4cig@wsgr.com>; c-mphonorecordsivexternal-lwteam@lw.com <c-mphonorecordsivexternal-lwteam@lw.com>; WEIL PHONO4 CIG <pandoraphonoIV@weil.com>; KELLOGG PHONO4CIG <KELLOGGPHONO4CIG@lists.kellogghansen.com>

Subject: RE: Phono IV - Letter re: COs R&Os to First Set of RFPs from Amazon, Pandora, and Spotify

Counsel,

I am following up on our correspondence from last week. Will the Copyright Owners be providing a response tonight? With discovery closing on Thursday, the Services need to know the Copyright Owners' position on these outstanding issues as soon as possible.

Thanks,

Alejandra Ávila

Kellogg, Hansen, Todd, Figel, & Frederick, P.L.L.C.
1615 M Street, N.W. | Suite 400 | Washington, DC 20036 | (202) 326-7920

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From: Avila, Alejandra <aavila@kellogghansen.com>

Sent: Thursday, December 16, 2021 8:17 PM

To: Harris, Marion R. <MHarris@PRYORCASHMAN.com>; Pryor Cashman PHONO4 CIG <crb_phonorecords_counsel@pryorcashman.com>

Cc: Kirkland PHONO4 CIG <aplphonorecordsIV@kirkland.com>; Wilson Sonsini PHONO4 CIG <phono4cig@wsgr.com>; c-mphonorecordsivexternal-lwteam@lw.com; WEIL PHONO4 CIG <pandoraphonoIV@weil.com>; KELLOGG PHONO4CIG <KELLOGGPHONO4CIG@lists.kellogghansen.com>

Subject: RE: Phono IV - Letter re: COs R&Os to First Set of RFPs from Amazon, Pandora, and Spotify

Counsel,

Please see attached correspondence from Amazon, Pandora, and Spotify.

Thanks,

Alejandra Ávila

Kellogg, Hansen, Todd, Figel, & Frederick, P.L.L.C.
1615 M Street, N.W. | Suite 400 | Washington, DC 20036 | (202) 326-7920

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From: Branson, Joshua D. <jbranson@kellogghansen.com>

Sent: Thursday, December 16, 2021 6:19 PM

To: Harris, Marion R. <MHarris@PRYORCASHMAN.com>; Brittany.Lovejoy@lw.com; Avila, Alejandra <aavila@kellogghansen.com>; KELLOGG PHONO4CIG <KELLOGGPHONO4CIG@lists.kellogghansen.com>; c-mphonorecordsivexternal-lwteam@lw.com; WEIL PHONO4 CIG <pandoraphonoIV@weil.com>

Cc: Kirkland PHONO4 CIG <aplphonorecordsIV@kirkland.com>; Wilson Sonsini PHONO4 CIG <phono4cig@wsgr.com>; Pryor Cashman PHONO4 CIG <crb_phonorecords_counsel@pryorcashman.com>

Subject: Re: [EXTERNAL] Re: Phono IV - Letter re: COs R&Os to First Set of RFPs from Amazon, Pandora, and Spotify

Marion: We have a different view of the *Web IV* order and do not believe that mere notice of a discovery dispute now – especially ones that are already ripe based on the parties' stated positions – is enough to extend the motion-to-compel deadline outside the statutory discovery period. That said, we are sensitive to everyone's upcoming holiday schedules,

and we don't necessarily want to litigate the point. At the same time, we cannot accept an indefinite extension, and I think all sides would benefit from a hard cut-off date by which motions to compel must be filed. In the interest of compromise, the Services thus propose **January 10** as the deadline by which motions to compel must be filed. If we are unable to reach agreement, we reserve the right to adhere to the December 23 deadline and argue that subsequent motions are untimely.

It sounded on the phone like the Copyright Owners may be amenable to this proposal, so please let me know if this works.

We'll follow-up shortly with a letter on the open issues from our meet-and-confer this week. As discussed, on the big-picture disputes, we need to reach agreement or impasse by tomorrow.

Josh

From: "Harris, Marion R." <MHarris@PRYORCASHMAN.com>

Date: Wednesday, December 15, 2021 at 9:33 AM

To: "Branson, Joshua D." <jbranson@kellogghansen.com>, "Brittany.Lovejoy@lw.com"

<Brittany.Lovejoy@lw.com>, "Avila, Alejandra" <aavila@kellogghansen.com>, KELLOGG PHONO4CIG

<KELLOGGPHONO4CIG@lists.kellogghansen.com>, "c-mphonorecordsivexternal-lwteam@lw.com" <c-mphonorecordsivexternal-lwteam@lw.com>, WEIL PHONO4 CIG <pandoraphonoIV@weil.com>

Cc: Kirkland PHONO4 CIG <aplphonorecordsIV@kirkland.com>, Wilson Sonsini PHONO4 CIG

<phono4cig@wsgr.com>, Pryor Cashman PHONO4 CIG <crb_phonorecords_counsel@pryorcashman.com>

Subject: [EXTERNAL] Re: Phono IV - Letter re: COs R&Os to First Set of RFPs from Amazon, Pandora, and Spotify

Hi all,

To follow up on our discussion yesterday re timing of motions to compel, the Copyright Owners do not believe that motions to compel need to be filed by the close of WDS discovery provided notice of a dispute that may result in a motion to compel is provided before the close of the statutory discovery period. Indeed, the CRB stated as much in *Web IV* --

However, under the Copyright Act, SoundExchange was not required to file a motion to preserve its rights. Pursuant to section 803(b)(6)(C)(iv), the Judges can order discovery "in connection with motions, orders *and disputes*" that are pending after the close of the statutory discovery period. 17 U.S.C. § 803(b)(6)(C)(iv) (emphasis added). Thus, **it would have sufficed if SoundExchange had simply placed the Services on notice that a discovery "dispute" existed (rather than filing a motion) because the Services had not yet produced the requested discovery, and that a subsequent motion might ensue.** Nonetheless, in fairness to SoundExchange, the Judges have not articulated this distinction previously and, as SoundExchange notes, section 803(b)(6)(C)(iv) technically addresses only the 60 day post-Written Direct Statement discovery period referenced in that section of the Act. In sum, the Judges cannot find that SoundExchange abused the litigation process or otherwise acted in an inappropriate manner.

Order Denying SoundExchange's Motion to Compel at 2-3 (Sept. 13, 2016) (eCRB Doc. No. 3714) (emphasis added).

Regards,

Marion R. Harris

Counsel

Pryor Cashman LLP

PUBLIC VERSION

7 Times Square, New York, NY 10036-6569
mharris@pryorcashman.com

Direct Tel: 212-326-0128
Main Fax: 212-326-0806
Mobile: 646-573-8465

www.pryorcashman.com

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From: Branson, Joshua D. <jbranson@kellogghansen.com>
Sent: Monday, December 13, 2021 2:17 PM
To: 'Brittany.Lovejoy@lw.com' <Brittany.Lovejoy@lw.com>; Harris, Marion R. <MHarris@PRYORCASHMAN.com>; Avila, Alejandra <aavila@kellogghansen.com>; KELLOGG PHONO4CIG <KELLOGGPHONO4CIG@lists.kellogghansen.com>; C-MPHONORECORDSIVEXTERNAL-LWTEAM@lw.com <C-MPHONORECORDSIVEXTERNAL-LWTEAM@lw.com>; WEIL PHONO4 CIG <pandoraphonoIV@weil.com>
Cc: Kirkland PHONO4 CIG <aplphonorecordsIV@kirkland.com>; Wilson Sonsini PHONO4 CIG <phono4cig@wsgr.com>; CRB Phonorecords Counsel <CRB_Phonorecords_Counsel@PRYORCASHMAN.com>
Subject: RE: Phono IV - Letter re: COs R&Os to First Set of RFPs from Amazon, Pandora, and Spotify

Amazon is open from 2-3 ET tomorrow – it sounds like that works for Britt. Does that work for others?

From: Brittany.Lovejoy@lw.com <Brittany.Lovejoy@lw.com>
Sent: Monday, December 13, 2021 1:36 PM
To: MHarris@PRYORCASHMAN.com; Branson, Joshua D. <jbranson@kellogghansen.com>; Avila, Alejandra <aavila@kellogghansen.com>; KELLOGG PHONO4CIG <KELLOGGPHONO4CIG@lists.kellogghansen.com>; C-MPHONORECORDSIVEXTERNAL-LWTEAM@lw.com <C-MPHONORECORDSIVEXTERNAL-LWTEAM@lw.com>; WEIL PHONO4 CIG <pandoraphonoIV@weil.com>
Cc: Kirkland PHONO4 CIG <aplphonorecordsIV@kirkland.com>; Wilson Sonsini PHONO4 CIG <phono4cig@wsgr.com>; Pryor Cashman PHONO4 CIG <crb_phonorecords_counsel@pryorcashman.com>
Subject: [EXTERNAL] RE: Phono IV - Letter re: COs R&Os to First Set of RFPs from Amazon, Pandora, and Spotify

I'm free on behalf of Spotify except for from 3 pm – 4 pm ET.

Britt N. Lovejoy

LATHAM & WATKINS LLP
505 Montgomery Street
Suite 2000
San Francisco, CA 94111-6538
Direct Dial: +1.415.646.8329
Fax: +1.415.395.8095
Email: brittany.lovejoy@lw.com
<https://www.lw.com>

From: Harris, Marion R. <MHarris@PRYORCASHMAN.com>
Sent: Monday, December 13, 2021 7:42 AM
To: Branson, Joshua D. <jbranson@kellogghansen.com>; Avila, Alejandra <aavila@kellogghansen.com>; KELLOGG PHONO4CIG <KELLOGGPHONO4CIG@lists.kellogghansen.com>; #C-M PHONORECORDS IV EXTERNAL - LW TEAM <C-MPHONORECORDSIVEXTERNAL-LWTEAM@lw.com>; WEIL PHONO4 CIG <pandoraphonoIV@weil.com>
Cc: Kirkland PHONO4 CIG <aplphonorecordsIV@kirkland.com>; Wilson Sonsini PHONO4 CIG <phono4cig@wsgr.com>; CRB Phonorecords Counsel <CRB_Phonorecords_Counsel@PRYORCASHMAN.com>
Subject: Re: Phono IV - Letter re: COs R&Os to First Set of RFPs from Amazon, Pandora, and Spotify

Josh,

Do you have availability tomorrow afternoon to discuss? If so, please let us know what works for you, and I can circulate a calendar invite.

Thanks,

Marion R. Harris

Counsel

Pryor Cashman LLP

7 Times Square, New York, NY 10036-6569

mharris@pryorcashman.com

Direct Tel: 212-326-0128

Main Fax: 212-326-0806

Mobile: 646-573-8465

www.pryorcashman.com

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From: Branson, Joshua D. <jbranson@kellogghansen.com>

Sent: Thursday, December 9, 2021 2:44 PM

To: Harris, Marion R. <MHarris@PRYORCASHMAN.com>; Avila, Alejandra <aavila@kellogghansen.com>; KELLOGG PHONO4CIG <KELLOGGPHONO4CIG@lists.kellogghansen.com>; Latham Watkins PHONO4 CIG <phonorecordsivexternal.lwteam@lw.com>; WEIL PHONO4 CIG <pandoraphonoIV@weil.com>

Cc: Kirkland PHONO4 CIG <aplphonorecordsIV@kirkland.com>; Wilson Sonsini PHONO4 CIG <phono4cig@wsgr.com>; CRB Phonorecords Counsel <CRB_Phonorecords_Counsel@PRYORCASHMAN.com>

Subject: Re: Phono IV - Letter re: COs R&Os to First Set of RFPs from Amazon, Pandora, and Spotify

I'm following up on this, given the tight discovery timetable we're all on. Can the Copyright Owners let us know their availability for a meet-and-confer to address the items below? Thanks.

From: "Branson, Joshua D." <jbranson@kellogghansen.com>

Date: Wednesday, December 8, 2021 at 1:54 PM

To: "Harris, Marion R." <MHarris@PRYORCASHMAN.com>, "Avila, Alejandra" <aavila@kellogghansen.com>, KELLOGG PHONO4CIG <KELLOGGPHONO4CIG@lists.kellogghansen.com>, Latham Watkins PHONO4 CIG <phonorecordsivexternal.lwteam@lw.com>, WEIL PHONO4 CIG <pandoraphonoIV@weil.com>

Cc: Kirkland PHONO4 CIG <aplphonorecordsIV@kirkland.com>, Wilson Sonsini PHONO4 CIG <phono4cig@wsgr.com>, Pryor Cashman PHONO4 CIG <crb_phonorecords_counsel@pryorcashman.com>

Subject: RE: Phono IV - Letter re: COs R&Os to First Set of RFPs from Amazon, Pandora, and Spotify

Marion: We would like to schedule another meet-and-confer to discuss the Services' various discovery requests to the Copyright Owners. The items we'd like to cover are:

- The outstanding issues addressed in your 12/3 letter, responding to our previous letter on the Services' first set of RFPs.
- The COs' responses to the Services' first and second sets of interrogatories.
- The COs' responses to Amazon's and Spotify's 2d set of RFPs.

Could you let us know your windows of availability tomorrow afternoon or Friday afternoon?

Josh

From: Harris, Marion R. <MHarris@PRYORCASHMAN.com>
Sent: Friday, December 3, 2021 11:20 PM
To: Avila, Alejandra <aavila@kellogghansen.com>; Branson, Joshua D. <jbranson@kellogghansen.com>; KELLOGG PHONO4CIG <KELLOGGPHONO4CIG@lists.kellogghansen.com>; Latham Watkins PHONO4 CIG <phonorecordsivexternal.lwteam@lw.com>; WEIL PHONO4 CIG <pandoraphonoIV@weil.com>
Cc: Kirkland PHONO4 CIG <aplphonorecordsIV@kirkland.com>; Wilson Sonsini PHONO4 CIG <phono4cig@wsgr.com>; Pryor Cashman PHONO4 CIG <crb_phonorecords_counsel@pryorcashman.com>
Subject: [EXTERNAL] RE: Phono IV - Letter re: COs R&Os to First Set of RFPs from Amazon, Pandora, and Spotify

Counsel:

Please see the attached correspondence.

Regards,

MARION R. HARRIS

Counsel

PRYOR CASHMAN LLP

7 Times Square, New York, NY 10036-6569

mharris@pryorcashman.com

Direct Tel: 212-326-0128

Main Fax: 212-326-0806

Mobile: 646-573-8465

www.pryorcashman.com

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From: Avila, Alejandra <aavila@kellogghansen.com>
Sent: Monday, November 29, 2021 8:45 PM
To: CRB Phonorecords Counsel <CRB_Phonorecords_Counsel@PRYORCASHMAN.com>
Cc: Latham Watkins PHONO4 CIG <phonorecordsivexternal.lwteam@lw.com>; WEIL PHONO4 CIG <pandoraphonoIV@weil.com>; Kirkland PHONO4 CIG <aplphonorecordsIV@kirkland.com>; Wilson Sonsini PHONO4 CIG <phono4cig@wsgr.com>; KELLOGG PHONO4CIG <KELLOGGPHONO4CIG@lists.kellogghansen.com>
Subject: Phono IV - Letter re: COs R&Os to First Set of RFPs from Amazon, Pandora, and Spotify

Counsel,

Attached please find correspondence on behalf of Amazon, Pandora, and Spotify concerning the Copyright Owners' Responses and Objections to the First Set of Requests for Production from Amazon.com Services LLC, Pandora Media, LLC, and Spotify USA Inc.

Best,

Alejandra Ávila

Kellogg, Hansen, Todd, Figel, & Frederick, P.L.L.C.

1615 M Street, N.W. | Suite 400 | Washington, DC 20036 | (202) 326-7920

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Before the
UNITED STATES COPYRIGHT ROYALTY BOARD
Washington, D.C.

In the Matter of:

DETERMINATION OF RATES
AND TERMS FOR MAKING AND
DISTRIBUTING PHONORECORDS
(*Phonorecords IV*)

Docket No. 21-CRB-0001-PR
(2023-2027)

**DECLARATION OF LISA D. ZANG
REGARDING RESTRICTED INFORMATION**

1. I am an associate with the law firm Wilson Sonsini Goodrich & Rosati, P.C., and counsel for Google LLC (“Google”) in the above-captioned proceeding (the “Proceeding”).

2. Pursuant to the Amended Protective Order issued in the above-captioned Proceeding on November 4, 2021 (the “Protective Order”), I submit this declaration in connection with Google’s Opposition to Copyright Owners’ Motion to Compel Production of Documents and Information from Services Concerning Their Rate Proposals and the accompanying declaration and exhibit (together, the “Opposition”).

3. I have reviewed the Opposition. I am also familiar with the definitions and terms set forth in the Protective Order. Each of the redactions and submissions under seal made in connection with the Opposition is necessitated by the designation, by one of the participants in this proceeding, of documents and/or information as “Confidential Information” under the Protective Order. Google is bound under the Protective Order to treat as “Restricted” and to redact information designated “Confidential Information” by participants, and has therefore done so. Google reserves all rights and arguments as to whether any such information is, in fact, “Confidential Information.”

4. Pursuant to 28 U.S.C. § 1746, I hereby declare under penalty of perjury that the foregoing is true and correct to the best of my knowledge, information, and belief.

Dated: February 3, 2022

Respectfully submitted,

/s/ Lisa D. Zang

Lisa D. Zang (Cal. Bar No. 294493)
WILSON SONSINI GOODRICH & ROSATI
633 West Fifth Street, Suite 1550
Los Angeles, CA 90071-2027
Tel.: (323) 210-2900
Fax: (866) 974-7329
lzang@wsgr.com

Attorney for Google LLC

Proof of Delivery

I hereby certify that on Thursday, February 03, 2022, I provided a true and correct copy of the Google's Opposition to Copyright Owners' Motion to Compel Production of Documents and Information from Services Concerning Their Rate Proposals to the following:

Powell, David, represented by David Powell, served via ESERVICE at davidpowell008@yahoo.com

Apple Inc., represented by Mary C Mazzello, served via ESERVICE at mary.mazzello@kirkland.com

Pandora Media, LLC, represented by Benjamin E. Marks, served via ESERVICE at benjamin.marks@weil.com

Copyright Owners, represented by Benjamin K Semel, served via ESERVICE at Bsemel@pryorcashman.com

Amazon.com Services LLC, represented by Joshua D Branson, served via ESERVICE at jbranson@kellogghansen.com

Johnson, George, represented by George D Johnson, served via ESERVICE at george@georgejohnson.com

Joint Record Company Participants, represented by Susan Chertkof, served via ESERVICE at susan.chertkof@riaa.com

Spotify USA Inc., represented by Joseph Wetzel, served via ESERVICE at joe.wetzel@lw.com

Zisk, Brian, represented by Brian Zisk, served via ESERVICE at brianzisk@gmail.com

Signed: /s/ Lisa Zang